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Marlene Dortch, Secretary
Federal Communications Commission
445 West 12th, SW
Washington, DC 20554
Submitted via: <http://fjallfoss.fcc.gov/ecfs2/>

Re: FCC WTB Docket No. 10-42

Dear Secretary Dortch:

The Arizona Consumers Council submits these comments in connection with FCC WTB Docket No. 10-42, in which the Federal Communications Commission seeks comment on whether late fees charged by commercial mobile radio service providers are part of the terms and conditions of commercial mobile radio service, and thus subject to regulation by states under their consumer protection statutes, or rates under 47 U.S.C. §332(c)(3)(A), such regulation of late fees is preempted.

The Arizona Consumers Council has been protecting, educating and advocating on behalf of Arizona consumers since 1966. It was instrumental in the establishment of Arizona's Residential Utility Consumer Office, and has advocated on behalf of its members and Arizona consumers in connection with many utility proceedings. It is a 501(c)(4) organization, and is affiliated with the Consumer Federation of America and Consumers Union.

Summary

This Commission should conclude that late fees are part of the terms and conditions of cell phone service, and thus subject to regulation under state consumer protection statutes. Such a conclusion is consistent with the statute, its legislative history, the dual federal-state regulatory regime, common understandings and definitions, and the practice of the companies at issue, none of which include information about late fees with their descriptions of their rates.

The Statute and Its Legislative History

In the Budget Act of 1993, Congress gave the federal and state government specific roles in the regulation of wireless service. While 47 U.S.C. § 332(c)(3)(A) prohibits states from regulating the "entry of or the rates charged by any commercial mobile service or any private mobile service," it also preserved the traditional authority of the states to over the "terms and conditions of commercial mobile services." 47 U.S.C. § 332(c)(3)(A). The legislative history of this provision demonstrates that "terms and conditions" includes such matters as late fees. It provides,

It is the intent of the Committee that the states would still be able to regulate the terms and conditions of these services. By "terms and conditions" the Committee intends to include such matters as *customer billing information and practices and billing disputes and other consumer protection matters*; facilities siting issues (i.e., zoning); transfers of control; the bundling of services and equipment; and the requirement that carriers make capacity available on a wholesale basis or such other matters as fall within a states' lawful authority. This list is intended to be illustrative only and not meant to preclude other matters generally understood to fall under "terms and conditions."

H.R. Rep. No. 103-111, 103rd Con., 1st Sess. (1993) reprinted in 1993 U.S.C.C.A.N. 378, 588, LEXSEE 103 H.Rpt. 111, at 4 (1993) (emphasis added). By using inclusive language to describe examples of the “terms and conditions” to be regulated by the states, Congress made it clear “terms and conditions” was to be read broadly.

Congress’s division of authority for regulation of wireless service between the state and federal government is consistent with the core concept of federalism upon which our system of government is based. Under this system, the historic police powers of the state are not to be superseded unless Congress makes its intent to do so clear. States retain jurisdiction over traditional areas of state regulation, including protecting consumers from unfair business practices, compensating consumers for harm, and interpreting and enforcing contracts.

The Meaning of “Terms and Conditions” and “Rates”

The cell phone companies themselves provide the clearest indication that late fees are part of the terms and conditions of cell phone service: none of the companies whose practices are at issue here includes information about late fees with descriptions of rates. In fact, two of the four include that information on a page entitled “terms and conditions,” and a third includes it on the “terms of service” page. For example, to learn that Sprint charges customers who are late a minimum of \$5 per month, one must maneuver to the bottom of a page about rates, then click on the words “terms and conditions” in tiny yellow type at the bottom left corner of the page, then scroll through the resulting pop-up, which describes the term of the contract, early termination fees, Sprint’s right to unilaterally change the contract, its right to change or suspend service without notice, the account-holders’ right to change the agreement, credit checks, account spending limits, restrictions on the use of the device, Sprint’s limitation on warranties as to the device, porting, coverage, roaming, data services and restrictions, activation and other miscellaneous charges, account and service charges, billing practices (including rounding up) before they arrive at a paragraph entitled “Your payments; late fees.” That information is followed by yet more terms, including taxes and government fees, how to dispute charges, authentication, contact, privacy, third party applications, location-based services, emergency calls, lost or stolen devices, disclaimer of warranties, dispute resolution, notice, and “Other important terms.”¹ By contrast, the “plan” page tells you how much it will cost per month for a how many minutes or message, or how much data.²

Similarly, persistent T-Mobile customers will learn that T-Mobile charges a minimum of \$5 per month in late fees after navigating to the bottom of a rate page, clicking on “Terms and Conditions,” scrolling through much the same information as the Sprint customer, to paragraph 12, “Payments, Late Fees & Deposits.”³ AT&T puts the information under “Terms of Service,” again at the bottom the page. While AT&T warns that a late fee will be charged, it doesn’t tell the customer how much it will be or how it might be calculated. Verizon Wireless customers find out about its \$5/month minimum late fee after they find their way to the fine print at the bottom of a rate page, click on “Customer Agreement,” and read through to “About My Payments.”⁴

It’s not just the cell phone companies’ practice of describing their late fees separately from their rates that leads one to the conclusion that late fees are not rates. Late fees are, as the companies make clear, penalties that certain customers pay for failing to perform certain conditions of the contract. Indeed, many consumers might not ever pay a late fee.

1 http://nextelonline.nextel.com/en/legal/legal_terms_privacy_popup.shtml#3, (last accessed on April 1, 2010)

2 <http://nextelonline.nextel.com/NASApp/onlinestore/en/Action/DisplayPlans>, (last accessed on April 1, 2010)

3 http://t-mobile.com/Templates/Popup.aspx?WT.z_unav=ftr_TC&PAsset=Ftr_Ftr_TermsAndConditions&print=true, (last accessed on April 1, 2010).

4 http://www.verizonwireless.com/b2c/globalText?textName=CUSTOMER_AGREEMENT&jspName=footer/customerAgreement.jsp, (last accessed on April 1, 2010)

All customers, on the other hand, pay rates, or a specific charge (usually per month) for a specific quantity of service, whether that service be measured in minutes, messages or bytes. This is consistent with the dictionary definition, "a charge per unit of a public-service commodity" or "an amount of payment or charge based on another amount."⁵ Clearly late charges, which are paid only under certain circumstances, and only by some customers, are not rates.

Late fees differ from the rates cell phone companies charge in other respects. Cell phone companies don't tout their late fees in the marketing materials. It's not easy to find the details about them. Cell phone companies don't compete based on their penalty fees, and it's not likely that customers shop based on a comparison of them either.

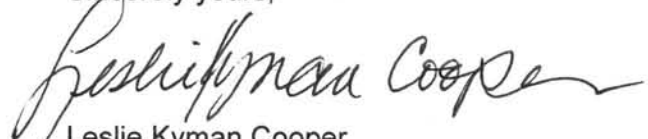
Finally, the conclusion that late fees are not rates, but rather part of the terms and conditions of service, is consistent with broader commercial practice. In commercial practice, matters such as provisions defining the duration of a contract, the time, place and manner of performance, actions that constitute a material breach, those actions that excuse performance, and penalties or damages that flow from either party's breach of a contract are commonly described in the terms and conditions of the contract. Included in the latter are liquidated damages clauses, which specify the amount a party agrees to pay in the event of a failure to perform. Late fees, which specify an amount to be paid in the event of a late payment, are a form of liquidated damages. As such, they are should be subject to regulation by states' under their consumer protection laws.

Conclusion

This Commission should give effect to Congress's words, and find that cell phone late fees are part of the "terms and conditions" that Congress intended the states regulate pursuant to their traditional police powers. A holding that these fees, which are nothing more than penalties paid by those customers who fail to perform a contract, would be consistent with the logical definition of "terms and conditions," and the dual federal-state regulatory scheme that governs us, and will allow states their traditional role of policing and regulating the terms of contracts entered into by their citizens.

Thank you for your consideration of these comments.

Sincerely yours,



Leslie Kyman Cooper
Executive Director

⁵ Rate. (2010). In Merriam-Webster Online Dictionary. Retrieved April 1, 2010, from <http://www.merriam-webster.com/dictionary/rate>